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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN,

Petitioner,

against

J. J. PARKER, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinions of the Court of Appeals for the Third Circuit (R. 27 to 34)[1] are reported at 390 F. 2d 360. The opinion of the District Court (R. 21 to 26) is reported at 256 F. Supp. 679 (M.D. Pa. 1966).

[1] Reference is to the Joint Appendix filed in this Court.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1968 (R. 35). The petition for a writ of certiorari and motion for leave to proceed in forma pauperis was filed on May 6, 1968 and granted by order of this Court dated October 14, 1968 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. §801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?

Statutes Involved

Constitution, Art. I, Sec. 8, cl. 14:

> The Congress shall have power . . . to make rules for the Government and Regulation of the land and naval Forces.

Constitution, Art. III, Sec. 2:

> Sec. 2 . . . The trial of all crimes except in case of impeachment shall be by jury; . . .

Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

10 U.S.C. §802(1) [Art. 2 of Articles of War]:

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induc-

tion into the armed forces; and other persons lawfully called or ordered into, or to duty in and for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

10 U.S.C. §880 (Art. 80 of Articles of War):

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

10 U.S.C. §920 (Art. 120 of Articles of War):

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

10 U.S.C. §928 (Art. 128 of Articles of War):

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

10 U.S.C. §930 (Art. 130 of Articles of War):

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

10 U.S.C. §934 (Art. 134 of Articles of War):

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons

subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Statement

Petitioner, a sergeant in the United States Army, was arrested while on leave and off-post in the early morning hours of July 21, 1956, as a result of an outcry by a guest at the Reef Hotel in Hawaii. He was questioned immediately after his arrest by the hotel security officer and civilian police, after which he was turned over to the military police. Thereafter he was charged with attempted rape, under Art. 80 (10 U.S.C. §880), assault with intent to commit rape, under Art. 130 (10 U.S.C. §930), and house-breaking with intent to commit rape under Art. 134 (10 U.S.C. §934). He was convicted on all counts and sentenced to 10 years at hard labor, a dishonorable discharge and forfeiture of all pay and allowances. The Army Board of Review and the United States Court of Military Appeals affirmed on January 4, 1957 and March 1, 1957, respectively.

After several intermediate steps not relevant in view of the single question accepted by this Court for review, petitioner, acting *pro se,* filed an application in April, 1966 for the writ of habeas corpus which is now before this Court (R. 3). The writ was denied on August 12, 1966 (R. 21). Petitioner appealed and the Court of Appeals affirmed on February 2, 1967 (R. 27). At that point counsel entered the case but after reargument the judgment was affirmed on March 8, 1968 (R. 29, 35).

Summary of the Argument

The question presented by this case is of the greatest significance to millions of present and future members of the armed forces, namely, whether they, alone, of all citizens, may be deprived of a trial before an independent civilian court, by a jury and with full due process rights when charged with a conventional offense which has no relationship to the military.

The right to trial by jury is secured by Article III in all cases in which that right was enjoyed under the common law at the time the Constitution was ratified. A limited and extraordinary exception to that right exists in the case of court-martial jurisdiction, a jurisdiction having well-defined and narrow limitations in 1789, and for over a hundred years prior to and after that date. There is overwhelming historical evidence—both of the American and British practice—showing that in the 17th, 18th and 19th Centuries, court-martial jurisdiction encompassed a narrow class of military offenses: all conventional crimes committed by members of the armed forces were tried by jury before civilian courts. This practice is deeply rooted in the English Constitutional struggle, primarily during the period of the Stuarts, and in the colonial experience which gave rise to one of the stated causes for the Declaration of Independence.

The concept of court-martial jurisdiction over peacetime civilian offenses was first introduced in the Articles of War of 1916. Prior to that time there was no suggestion in our history that trial in a civilian court could be denied in the circumstances of this case.

There is a heavy presumption against such expansion of military jurisdiction, both because it usurps civilian authority and because it deprives the individual of substantial constitutional rights.

In the instant case there exists not only the historically acceptable and constitutionally preferred civilian forums as an available alternative to military tribunals, but there is also no compelling countervailing purpose that is served by the imposition of trial by court-martial.

Congressional power to enact criminal laws is merely incidental to its delegated powers, except in those instances where it exercises its maritime or territorial jurisdiction or its power over a federal enclave. In all other instances there must be a substantial relationship between the acts sought to be proscribed and the federal interest sought to be protected. The commission of conventional offenses off-base and off-duty by members of the armed forces bears little, if any, relationship to the federal interest in the maintenance of military discipline. There is, therefore, no basis for Congressional legislation as to the conventional offenses involved here. And to the extent that there may be a limited military aspect to a civil offense, the jurisdiction of Congress must be appropriately limited to that aspect of the crime, and may not punish the offense in general terms.

ARGUMENT

Introduction

This case presents an issue of far-reaching import which has never been passed upon by this Court and which, every day, becomes more important to the continued liberty of millions of citizens of the United States:

May Congress take away from a member of the Armed Forces the right, enjoyed by all other persons in this country, to be indicted by a grand jury and tried by a petit jury before a civilian court when the offense charged is a conventional crime, having no direct or substantial effect on the maintenance of military discipline, alleged to have been committed in peacetime, while the accused was off-post and off-duty?

Surprisingly, this question has never even been presented to this Court, although the Court has from time to time warned against the extension of the "very limited and extraordinary jurisdiction" of military tribunals and has noted that:

> "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid* v. *Covert*, 354 U.S. 1, 21.

See also *Toth* v. *Quarles*, 350 U.S. 11, 23; *Duncan* v. *Kahanamoku*, 327 U.S. 304, 307, 318.

The matter is one of profound significance. We must assume that for the foreseeable future millions of our

citizens will be members of the Armed Forces. A statute which purports to deprive these citizens of their right to trial in a civilian court with its independent juridicary and other constitutional guarantees is contrary to Art. III, Sec. 2 of the Constitution and a violation of the Fifth and Sixth Amendments.

Although the question has never before been squarely presented to or decided by this Court, the Court does not "write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for non-military offenses—has a long history". *Lee* v. *Madigan*, 358 U.S. 228, 232. The Court then stated:

> "Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed." *Id.* 234.

This conclusion is amply supported by that "long history" which makes it clear that Congress had no authority to give to the military the power it now claims.

POINT I

Congress Has No Constitutional Authority to Extend Court-Martial Jurisdiction to Conventional Crimes Committed in Peacetime by a Member of the Armed Forces Who Was Off-Post and Off-Duty.

The original understanding of those who drafted the Constitution is highly relevant in determining the meaning of that document; particularly in enforcing the guarantee of a jury trial this Court has looked to English and early American history.

> "The object [of Art. III, Sec. 2] was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future." *Ex Parte Quirin*, 317 U.S. 1, 39.

See also *Callan* v. *Wilson*, 127 U.S. 540, 548; *Cummings* v. *Missouri*, 4 Wall. 277, 332; *Ex Parte Grossman*, 267 U.S. 87, 108-109; *Patton* v. *United States*, 281 U.S. 276, 289.

The history of courts-martial in Anglo-American law has been discussed in some detail by this Court on prior occasions.[2] In the following discussion we will confine ourselves, for the convenience of the Court, to that portion

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[2] *Lee* v. *Madigan*, *supra*, at 232-233; *Ex parte Reed*, 100 U.S. 13, 21; *Caldwell* v. *Parker*, 252 U.S. 376, 380-383, 385-387, 389; *Ex parte Mason*, 105 U.S. 696; *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 83; *Reid* v. *Covert*, *supra*, at 23-30. See generally Winthrop, *Military Law and Precedents* (2d Ed. 1920); Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids*, 112 U. of Pa. L. Rev. 317 (1964); Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 (1960).

of the history which is particularly relevant to the issue in this case.

Practice during the period before and after the ratification of the Constitution confined court-martial jurisdiction to a very narrow class of military offenses. The Articles of War enacted by the Continental Congress in 1776 established court-martial jurisdiction over only offenses such as treason, desertion, sedition, striking or scorning superior officers, tardiness for parade formation, failure to salute an officer and similar conduct having an obvious military significance. Text in Winthrop, *Military Law and Precedents* 1489 (2d Ed. 1920).[3]

The Articles of War were reenacted in 1789, and on occasion thereafter, and underwent their first revision in 1806.[5] None of these early versions of the Articles asserted court-martial jurisdiction over non-military crimes or over conventional crimes committed off-post and off-duty by members of the Armed Forces. These Articles remained in force, substantially unaltered, until 1863 and were not fully revised until 1874.

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[3] The Articles of 1776, drafted by John Adams and Thomas Jefferson, readopted, without material change the Articles of War of 1775 and minor additions made thereto in that year. Text in Winthrop, *supra*, at 1478, 1486; see also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293, 298 (1957); 2 Journ. Cont. Cong. 85, 89-96, 111 (1775). The Articles of 1775 were patterned after the Massachusetts Articles of War of 1775 and the British Articles of War of 1765, both of which were similarly limited in coverage to a narrow class of military offenses. Text in Winthrop, *supra* at 1448.

[4] Act of Sept. 29, 1789, c. 25, §4, 1 Stat. 96, text in Winthrop, *supra*, at 1489, reenacted by the Act of Apr. 30, 1790, c. 10, §13, 1 Stat. 14; the Act of Mar. 3, 1795, c. 44, §14, 1 Stat. 432; the Act of May 30, 1796, c. 39, §20, 1 Stat. 486.

[5] Articles of War of 1806, Act of Apr. 10, 1806, §1, Art. 59, 2 Stat. 366, text in Winthrop, *supra* at 1509.

The limitation of the jurisdiction of courts-martial to military crimes was not an accident and is easily understood against the background of then recent English history. See *Reid* v. *Covert*, *supra* at 25-26. The British Articles of War of 1765, from which the American Articles of 1776 were drawn, contained similar provisions limiting court-martial jurisdiction to military crimes. Text in Winthrop, *supra* at 1448; see also *Caldwell* v. *Parker*, 252 U.S. 376, 382.

A reading of the history makes it abundantly clear that there were two abuses about which the English and American civilians were concerned in the 17th and 18th centuries. The first was that the summary trial afforded by a court-martial would deprive the defendant of the basic rights guaranteed to an accused under Anglo-American law. The second was that the army would not punish malefactors at all and thus leave the way open to unbearable offenses committed by the military upon the civilian population. Both of these fears were well justified by the circumstances of the times and both could be avoided by seeing to it that persons accused of crime were to be tried in civilian courts unless the crime was of such a nature that only the military was concerned.

Thus, not only did the 1776 and 1806 Articles of War make no provisions for trial of "civil" crimes, but common to both was the section mandating civilian trial of all non-military offenses. Section X, Article I, of the Articles of 1776 provided that:

> "[w]henever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or prop-

erty of the good people of any of the United States, such as is punishable by the known laws of the land, the commanding officer and the officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or on behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding or assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

Substantially the same provision appears in the Articles of 1806 at Art. 33.

The British Articles of War, from which the American Articles were drawn, had always contained a similar provision to compel military compliance with what had become a principle of the English Constitution that all civil offenses committed by servicemen shall be tried by civilian courts.*

The very first criminal statute passed by Congress, the Act of April 30, 1790, §3, 1 Stat. 112, 113, specifically

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* Winthrop, *supra*, at 1446; *Caldwell* v. *Parker*, *supra*, at 382; Duke and Vogel, *supra*, 13 Vand. L. Rev. at 445-446.

made the crime of murder or manslaughter committed "within any fort, arsenal, dock yard, magazine or in any other place or district of the country, under the sole and exclusive jurisdiction of the United States" triable in a federal civilian court.[7]

This consistent practice, several times reviewed and readopted by the early Congresses "must be regarded as a contemporary construction of both Article III, §2, and the Amendments to the Constitution" which "is entitled to the greatest respect. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Field* v. *Clark*, 143 U.S. 649, 691; *United States* v. *Curtiss-Wright Corp.*, 289 U.S. 304, 329". *Ex parte Quirin, supra*, at 41-42.

The history of court-martial jurisdiction in England provides a significant background to our own early attitudes on the matter. The question of court-martial jurisdiction over civilian offenses attained constitutional significance during the reign of the Stuarts in the dispute between the Crown and Parliament over control of the army.

In response to Charles I's "attempt, contrary to the Common Law, [to use] courts-martial to try soldiers for certain non-military offenses",[8] the Parliament adopted its Petition of Right of 1627.[9] The Parliament protested:

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[7] See also the Judiciary Act of 1789, §§9, 11, 1 Stat. 73, 76, 79 granting district and circuit courts jurisdiction over "all crimes and offenses cognizable under the authority of the United States." All other conventional crimes not covered by the Act of 1790 were encompassed by the Assimilative Crimes Act of Mar. 3, 1825, 4 Stat. 115 which is presently codified as 18 U.S.C. §13.

[8] *Reid* v. *Covert, supra* at 24. More particularly, the Crown sought to enforce illegal revenue measures, i.e., revenue measures not passed by Parliament, by quartering troops in the homes of

"nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to Martial Law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and then to cause to be executed and put to death according to the Law Martial:"

and demanded:

"that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them and if your Majesty's subject be destroyed, or put to death contrary to the laws and franchise of the land."

Adye, in his *Treatise on Courts-Martial*, reports that Charles assented and dissolved all existing military tri-

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citizens who refused to pay and by trying offenses committed by those troops against the civilian citizens before summary courts-martial. See Adye, *Treatise on Courts-Martial*, 13-14 (1800). See also Davis, *A Treatise on the Military Law of the United States*, 2-3 (1915); Winthrop, *supra*, at 46-47.

*3 Car. 1, c. 1.

bunals. *Id.* at 15. See also Hale, *History of the Common Law of England* 35 (1739).

There was no precedent for the court-martial jurisdiction asserted by Charles I. For martial law as it had been known before the Petition of Right was concerned only with military offenses and was "rather indulged than allowed, and that only in cases of necessity, in time of open war [and] not permitted in time of peace, when the ordinary courts of justice are open." Hale, *supra*, at 36;[10] see also 1 Blackstone, Commentaries 413. And Macauley reports that

> "The Common Law of England knew nothing of courts-martial, and made no distinction, in time of peace, between a soldier and any other subject; nor could the government then [1685] venture to ask even the most loyal parliament for a mutiny bill. A soldier, therefore, by knocking down his colonel, incurred only the ordinary penalties of assault and battery, and, by

[10] Predecessors of the 18th Century English court-martial were the courts of Constable and Marshall dating back to the early 14th Century. The jurisdiction of these courts was not only limited by statutes but as Hale reports "by the very common law". Hale, *History of the Common Law*, 33-34 (1739). While these courts had jurisdiction to hear cases "of death and murder committed beyond the sea . . . [and in time of war of] the offenses and miscarriages of soldiers contrary to the rules of the Army" the extent of this "martial law" was solely to military offenses. Adye, *supra*, at 11-12; Davis, *A Treatise on the Military Law of the United States*, 1 (1915); 1 Holdsworth, *History of the English Common Law*, 573-74 (1922). A major extension of the jurisdiction of these courts was authorized by 18 Henry VI, 7 Henry VII, c. 1 and 3 Henry VIII, c. 5 to cover cases of treason, desertion or sedition of military personnel. Adye, *supra*, at 11-22. Finally, as Hale reports, these courts fell into disuse "upon great reasons". Hale *supra*, at 36. See also *Reid* v. *Covert*, *supra*, at 25 n. 44; Duke and Vogel, *supra*, 13 Vand. L. Rev. at 44 n. 31.

sleeping on guard, or by deserting his colours, incurred no legal penalty at all." 1 Macaulay, *History of England*, 231 (1874 ed.)[11]

The principle against expansion of military jurisdiction over civil offenses was further embedded in the English Constitution by James II's promulgation of Articles of War "authorizing the trial of soldiers for non-military crimes by courts-martial."[12] This action hastened the revolution that brought William and Mary to the throne upon their agreement to abide by a Bill of Rights which, among other things, protected the right of trial by jury." *Reid* v. *Covert*, *supra*, at 26.

One of the first Acts of Parliament after the final overthrow of the Stuarts was the Mutiny Act of 1689,[13] authorizing trial by court-martial, in time of war or civil insurrection, for the military offenses of mutiny, sedition and desertion. See Davis, *supra*, at 2-4; Adye, *supra*, at 60-62; *Reid* v. *Covert*, *supra* at 23-24, n. 42. This authorization, however, was carefully circumscribed by the Act's preamble which declared that except for the necessity of maintaining military discipline,

"Noe man may be forejudged of Life or Limb, or subjected to any kind of punishment by Martial Law, or in other manner than by judgment of his Peeres, and

[11] See also Fairman, *The Law of Martial Rule*, 9 (1943); Bishop, *supra*, 112 U. Pa. L. Rev. at 321-323; 2 Campbell's, *Lives of the Chief Justices*, 351-352.

[12] The Articles of War of James II are reprinted in Winthrop, *supra*, at 1434.

[13] 1 William and Mary, c. 5, reprinted in Winthrop, *supra*, at 1446.

according to the known and established Laws of this Realm."

All of this was familiar history to those who wrote our Constitution and, indeed, the Declaration of Independence itself makes it clear that the concern of Jefferson and his associates for the preservation of a civilian government were based not only on the history of England, but on the history of the colonies. The Declaration of Independence itself protested that George III

"has kept among us, in times of peace, standing armies, without the Consent of our legislature. He has affected to render the Military independent and superior to the Civil Power.

"He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

"For quartering large bodies of armed troops among us: For protecting them by a mock trial, from punishment for any Murders which they should commit on the Inhabitants of these States."

The concept of peacetime court-martial jurisdiction over civilian crimes committed by soldiers was first introduced into our law by the revised Articles of War of 1916, 39 Stat. 650. See Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids,* 112 U. of Pa. L. Rev. 317, 327 (1964). Those Articles asserted military jurisdiction over all offenses by members of the Armed Forces, even in time of peace, except that jurisdiction over capital crimes (such

as murder and rape) was limited to wartime.[14] These 1916 Articles constituted a major break with precedent and, we submit, represented an unconstitutional arrogation of power.

The extent of this break is illustrated by this Court's treatment of the immediate predecessors of the 1916 Articles, the Enrollment Act of 1863[15] and the Articles of War of 1874.[16]

In the midst of the Civil War, Congress passed the Enrollment Act, Section 30 of which made the non-military crimes of murder, assault and rape subject to court-martial jurisdiction, "in time of war, insurrection and rebellion."

The only case in which this Court was called upon to apply §30 was *Coleman* v. *Tennessee*, 97 U.S. 509, where the issue was whether the State of Tennessee had jurisdiction over the crime of murder committed by a soldier in the occupying Union Army. The holding of this Court was expressly limited to a ruling that under §30 *exclusive*

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[14] Article 93, Articles of War of 1916, 39 Stat. 650, 664 provided:

"Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

Article 92 of the Articles of War of 1916, 39 Stat. 650, 664 provided:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

[15] Act of March 3, 1863, 12 Stat. 736.

[16] Text in Winthrop, *supra*, at 1523.

jurisdiction to try this crime, committed in occupied territory, had been lodged with the military.

> "[W]hen the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by [§30], exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service." *Id.* at 515.

To hold otherwise would lead to the "incongruous and absurd" result of "permitting an officer or soldier of an invading army to be tried by his enemy, whose country he has invaded." *Id.* at 516.

Thus, as this Court understood it, §30 was only applicable in circumstances equivalent to martial law,[17] where the courts of the State were not open. See *Caldwell* v. *Parker, supra,* at 386; *Coleman* v. *Tennessee, supra,* at 515; *Reid* v. *Covert, supra* at 23-24 n. 42.

In *Coleman,* the Court assumed by way of dictum at p. 514, "the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military." The Congressional power in this area, said the Court, "would seem to be plenary." But grave dangers inhere in this line of reasoning and it seems inconsistent with modern doctrine. The power to try by

[17] Imposition of military jurisdiction had always been countenanced in time of war when the civilian courts were not sitting. See Blackstone, *supra;* Hale, *supra.* In *Caldwell* v. *Parker, supra,* at 387, the Court recognized "the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified."

court-martial is the power to deprive the citizen—whether soldier or civilian—of important constitutional rights, *Lee* v. *Madigan, supra* at 234, and to destroy the protections of Federalism, *Caldwell* v. *Parker, supra,* at 385-387.[18] For these reasons the *Coleman* dictum should be read in its own narrow context—the unique exigencies of the Civil War, the nation's first conscription law and the Court's apparent vision of marching armies. *Coleman* v. *Tennessee, supra,* at 514-515. This Court, of course, has in many recent decisions seemed to deny the broad assumption of plenary power made in *Coleman*. See *Toth* v. *Quarles, supra,* at 22; *Reid* v. *Covert, supra,* at 23-30. Finally, the "generous" reading of the term "in time of peace" so as to avoid "the dilution of the liberties of the citizen" in *Lee* v. *Madigan, supra,* at 233-235, indicates that given its most expansive reading, the *Coleman* dictum would not apply in peacetime. See also *Caldwell* v. *Parker, supra,* at 385; Duke and Vogel, *supra,* 13 Vand. L. Rev. *supra,* at 450.

In *Ex parte Mason,* 105 U.S. 696, the Court again reviewed §30, reenacted as Art. 58 of the Articles of War of 1874.[19] The very restrictive application of §30 given by the Coleman Court was confirmed and accentuated by the Court's close reading of the General Article, Art. 62,[20] to

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[18] In *Caldwell, id.* at 386-387, the Court intimated that the exercise of military authority of this kind would be an equivalent usurpation of power to that condemned in *Ex parte Milligan,* 4 Wall. (71 U.S.) 2.

[19] Art. 59, which mandated surrender to civilian authorities, was aligned with Art. 58 by the insertion of "except in time of war."

[20] Art. 62 provides: "All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental garrison or a field officers' court-

encompass solely offenses against the military; in this case the instance of a serviceman who, while on guard in a military prison, attempted to kill an inmate.

We are aware that members of this Court have given Art. I, §8, cl. 14 a more flexible reading than we think is required by our history, and have urged that, at least in the context of the problem exemplified by *Reid* v. *Covert*, *supra*, the necessary and proper clause supplements clause 14. See *Reid* v. *Covert*, *supra* at 65, 71 (Harlan, J., concurring); *Kinsella* v. *Singleton*, 361 U.S. 234, 249 (Harlan and Frankfurter, JJ., dissenting). Of course, the special problem of *Covert* raised by *In re Ross*, 140 U.S. 453, does not exist here since the protection of the Constitution unquestionably applies to petitioner. *Burns* v. *Wilson*, 346 U.S. 137; *Wade* v. *Hunter*, 336 U.S. 684. Still, the question may be posed, analogous to the question posed by Mr. Justice Harlan's concurrence in *Covert:* If Congress has the power, through the necessary and proper clause, to extend court-martial jurisdiction to this kind of offense, can it be done here in the face of Art. III and the Fifth and Sixth Amendments? We think it cannot.

This Court has established the general proposition that the constitutional power of Congress to authorize trial by court-martial must be limited to "the least possible power adequate to the end proposed." *Toth* v. *Quarles*, *supra*, at 23; *McElroy* v. *Guagliardo*, 361 U.S. 281, 286. This rule, of course, is but part of a more general rule that, in the treating of any of the fundamental rights of citizens the narrowest and least drastic means available must be em-

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martial according to the nature and degree of the offense, and punished at the discretion of the court."

ployed. *Bloom* v. *Illinois*, 391 U.S. 194, 202-203; *Shelton* v. *Tucker*, 264 U.S. 479, 488; *Schneider* v. *New Jersey*, 308 U.S. 147; *Lovell* v. *Griffin*, 303 U.S. 444; *Tally* v. *California*, 362 U.S. 60. Certainly there can be no more fundamental right than the right to be tried for crime in an Article III court by a jury of one's peers, under the full protection of due process of law.

In this view of the case "the method of trial alone is the issue", *Reid* v. *Covert*, *supra*, at 47 (Frankfurter, J., concurring). The question is whether, as a matter of substantive due process, trial by court-martial is the only reasonable means for protecting the interest of the state in this situation.

There are compelling reasons why purely military offenses, of the kind normally and historically tried by court-martial should be so tried. These offenses, often committed in the line of duty, may pose such an immediate threat to military discipline that "prompt, ready-at-hand means of compelling obedience and order" is necessitated. *Toth* v. *Quarles*, *supra*, at 22. Of course, the necessity is heightened by a state of war and the preparation for or actual engagement of troops in battle. Moreover, the majority of military offenses—infractions of military rules—are of the sort in which the court-martial will have an expertise and which, indeed, may be far beyond the scope of the experience of a civilian court. See *Toth* v. *Quarles*, *supra*, at 18.

The offense involved in this case, one inherently civil in nature, which carries with it extremely serious penalties, was committed while the petitioner was off-base and off-duty. While we argue that such conduct does not constitute a "case arising in the land or naval forces", neverthe-

less, it is certainly apparent that the impact on military discipline, if any, is remote and indirect.

In the Court of Appeals, respondent argued that all three offenses here would lie under the "General Article", Art. 134 of the Articles of War, 10 U.S.C. 934.

The General Article can be traced back to the Revolution and, indeed, back to pre-revolutionary English history. In 1776 it read as follows:

> "All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the above articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion." Winthrop, *supra*, at 1503.

In one form or another it has been incorporated in all Articles of War ever since. See generally Winthrop, *supra*, at 720-735.

It is clear that the offenses charged, committed off-base, off-duty, have never been encompassed within the scope of the General Article. See *Ex parte Mason*, *supra;* Winthrop, *supra*, at 724. The history of court-martial jurisdiction, extensively cited above, makes this clear. Constitutional rights may not be destroyed by techniques of pleadings, and the words of the Uniform Code cannot be quoted out of historical context to prove jurisdiction.

But even more serious, the suggestion raises more problems than it solves. The General Article is, under modern constitutional doctrine, totally inadequate to support a

criminal conviction. It suffers from the twin vices of overbreadth and vagueness. It reads:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

Read as a criminal statute, this article can hardly stand in the face of *Lanzatta* v. *New Jersey*, 306 U.S. 451; *Connally* v. *General Construction Co.*, 269 U.S. 385, and *Winters* v. *New York*, 333 U.S. 507.

Certainly members of the Armed Forces are entitled to as much protection from a criminal statute so vague and uninformative as is a civilian. The Court of Military Appeals has itself said:

> "The time is long since past when this court will lend its ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all protection of the Bill of Rights." *United States* v. *Tempia*, —— USMCA ——, 35 U.S.L.W. 2625.

See, also *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir. 1965); *Shaw* v. *United States*, 357 F. 2d 949 (Ct. Cl. 1966); *Kennedy* v. *Commandant*, 377 F. 2d 339 (10th Cir. 1967).

There is here no question that the offense will go unpunished. The civil courts were open, and the crime cognizable under their jurisdiction. Indeed, the choice of method of trial was wholly in the hands of the United States Government, since Hawaii was a territory at the time the crime was committed. *Cf. Grafton* v. *United States,* 206 U.S. 333.

It is unreasonable to contend that "army discipline will be disrupted, its morale impaired or its orderly processes disturbed" by giving soldiers civilian trials for civil offenses, *cf. Toth* v. *Quarles, supra,* at 22, unless it be admitted that the summary nature of court-martial procedure is itself a device for punishing or deterring offenses. But such device is inherently contrary to the Constitution. *Cf. Bloom* v. *Illinois, supra* at 208.

Thus, there are present in this case none of the reasons which might preempt the historically acceptable and constitutionally preferred alternative to trial by court-martial, that of trial in a civilian court with the prized rights to trial by jury and to due process procedures. *Cf. Duncan* v. *Kahanamoku,* 327 U.S. 304.

POINT II

Federal Jurisdiction May Not Extend to Substantive Civil Offenses But Is Confined Solely to Military Offenses or at Most the Military Aspect of Civil Offenses.

Congressional power to declare acts criminal is limited in its exercise to those acts which have "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An Act not having any such relation is one in respect to which the State can alone legislate." *United States* v. *Fox*, 95 U.S. 670, 672; *cf. Screws* v. *United States*, 325 U.S. 91, 139 (Mr. Justices Roberts, Jackson and Frankfurter dissenting).

We address ourselves here not to the question of whether Congress may make rape an offense punishable by court-martial, but whether Congress may make rape an offense at all except when committed "within the special maritime and territorial jurisdiction of the United States", 18 U.S.C. 2031. See also 18 U.S.C. 81 (arson); 18 U.S.C. 111 (assault); 18 U.S.C. 661 (embezzlement); 18 U.S.C. 111, 112, 113 (homicide) and other similar provisions of the Code.

The question presented by this case is not answered by a finding that there is military jurisdiction over the *person* of a soldier. For a distinctly different question from that raised in *Reid* v. *Covert*, *supra* and *Kinsella* v. *Singleton*, *supra*, is raised here, namely, whether there is any jurisdiction over the *offense*.

Rape, attempted rape and assault are public offenses against the community. The government which normally represents this community is the State, and the Federal

government has no jurisdiction except where it acts pursuant to Art. IV, §3, of the Constitution.[21] See Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law and Contemp. Prob. 64 (1948). The Federal government cannot acquire jurisdiction over an offense not otherwise coming within its power merely by virtue of the status of the person charged with crime.

Of course, Congress may make conduct criminal, dependent on the status of the defendant, but only when there is some direct relationship between the conduct prohibited and the status of the defendant—e.g., only a federal official may be guilty of the federal crime of soliciting a bribe to influence him in the performance of his duty (18 U.S.C. 202), but certainly Congress could not provide that rape, when committed by a federal employee, thereby becomes a federal offense.

Certain offenses which have a "direct relation to the execution of a power of Congress" may be punished by Congress, but the offense punished in such a case is not the substantive civil crime of, e.g., murder, but the "federal" crime of murder of an officer or employee of the United States (18 U.S.C. 1114). Congress may not punish embezzlement, but it may punish embezzlement of property of the United States (18 U.S.C. 641). In such cases, the definition of the crime and the penalty therefor must be related to the federal interest Congress seeks to protect, and not the general community interest which may be concerned. And the status of the defendant cannot turn an ordinary state crime into a federal crime without

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[21] It is clear that Article III, Section 2 cl. 3 and the other Constitutional protections to criminal defendants would be applicable in such a case.

such federal interest. See adopting this view, Bishop, *supra*, 112 U. of Pa. L. Rev. at 553-556, 377; Comment, 73 Harv. L. Rev. 1626 (1960).

This principle was considered in detail by this Court in *Ex parte Mason, supra* at 698:

> "The *gravamen* of the military offense is, that while standing guard as a soldier over a jail in which a prisoner was confined, the accused willfully and maliciously attempted to kill the prisoner. Shooting, with intent to kill, is a civil crime, but shooting a soldier of the army standing guard over a prison, with intent to kill a prisoner confined there, is not only a crime against society, but an atrocious breach of military discipline. . . . It follows that the crime charged and for which the trial was had was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a jail over which he was standing guard."

This fundamental distinction between state and federal jurisdiction over crime was totally ignored by the Congress in writing the Uniform Code of Military Justice. Some of the crimes defined are clearly military in nature, and their relationship to a federal (i.e. military) interest is apparent. See Art. 82 (10 U.S.C. 882) which punishes solicitation to desert or to commit an act of misbehavior before the enemy; or Art. 83 (10 U.S.C. 883), relating to fraudulent enlistment, or Art. 85 (10 U.S.C. 885) which punishes desertion.

But Art. 118 (10 U.S.C. 918) relates to murder, without reference to any military interest, other than the status of the accused. Art. 120 (10 U.S.C. 920) punishes rape;

Art. 121 (10 U.S.C. 921) punishes larceny; Art. 122 (10 U.S.C. 922) punishes robbery. *Cf. Grafton* v. *United States, supra.* What is the reason for asserting federal jurisdiction over such offenses, which do not contain, as a statutory element, any federal interest?

Criminal jurisdiction is, fundamentally, a state matter; there is no general federal criminal jurisdiction, and hence, there can be no general federal court-martial jurisdiction over crimes.

CONCLUSION

The Judgment below should be reversed.

Respectfully submitted,

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